

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION
3 UNITED STATES OF AMERICA,) Case 1:18-cr-00083
4 Plaintiff,)
5 v.) Alexandria, Virginia
6 PAUL J. MANAFORT, JR.,) May 4, 2018
7 Defendant.) 9:55 a.m.
8) Pages 1 - 48

9 TRANSCRIPT OF MOTIONS
10 BEFORE THE HONORABLE T.S. ELLIS, III
11 UNITED STATES DISTRICT COURT JUDGE

12 APPEARANCES:

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23 THE DEFENDANT, PAUL J. MANAFORT, JR., IN PERSON
24

25 COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

1 THE COURT: All right. Call the next case,
2 please.

3 THE CLERK: *United States v. Paul J.*
4 *Manafort, Jr.*, Criminal Case 1:18-cr-83.

5 THE COURT: All right. Who is here on behalf
6 of the special prosecutor?

7 MR. WEISSMANN: Good morning, Your Honor.
8 Andrew Weissmann for the special counsel's office.
9 With me today are Michael Dreeben, who will be arguing
10 the motion, Greg Andres, and Uzo Asonye.

11 THE COURT: Yes. Good morning to all of you.
12 Who will argue today, Mr. Weissmann?

13 MR. DREEBEN: Good morning, Your Honor,
14 Michael Dreeben.

15 THE COURT: All right. Spell that for us,
16 please.

17 MR. DREEBEN: D as in David, R, E as in echo,
18 E as in echo, B as in boy, E as in echo, N as in
19 November.

20 THE COURT: Okay. And, Mr. Asonye, I'm glad
21 to see you here. I indicated that the special counsel
22 should have local counsel, and that's you.

23 MR. ASONYE: Yes, Your Honor. Thank you.

24 THE COURT: Good morning.

25 MR. ASONYE: Good morning.

1 THE COURT: All right. For the defendant,
2 who is here?

3 MR. ZEHNLE: Good morning, Your Honor.
4 Thomas Zehnle on behalf of Mr. Manafort, and with me is
5 Kevin Downing.

6 THE COURT: All right. And also with you is?

7 MR. ZEHNLE: The defendant, Mr. Manafort.
8 I'm sorry.

9 THE COURT: All right. Good morning to all
10 of you.

11 Who will argue today?

12 MR. DOWNING: Mr. Downing will argue today,
13 Your Honor.

14 THE COURT: All right. Spell that for me,
15 please.

16 MR. DOWNING: Mr. Downing's name?
17 D-O-W-N-I-N-G.

18 THE COURT: All right. Thank you.

19 The matter is before the Court today on your
20 motion, Mr. Downing. So you may begin. I have some
21 knowledge.

22 Let me ask a few facts so that I can be
23 clear. Let me ask the government -- or not the
24 government -- the special counsel a few questions,
25 Mr. Dreeben.

1 MR. DREEBEN: Yes, Your Honor.

2 THE COURT: All right. The indictment
3 against Mr. Manafort was filed in February, but it
4 actually was antedated by a filing in the District of
5 Columbia. These allegations of bank fraud, of false
6 income tax returns, of failure to register or report
7 rather, failure to file reports of foreign bank
8 accounts, and bank fraud, these go back to 2005, 2007,
9 and so forth. Clearly, this investigation of
10 Mr. Manafort's bank loans and so forth antedated the
11 appointment of any special prosecutor and, therefore,
12 must've been underway in the Department of Justice for
13 some considerable period before the letter of
14 appointment, which is dated the 17th of May in 2017.
15 Am I correct?

16 MR. DREEBEN: That is correct, Your Honor.

17 THE COURT: All right. So when the special
18 prosecutor was appointed -- and I have the letter of
19 appointment in front of me -- what did they do? Turn
20 over their file on their investigation of Mr. Manafort
21 to you all?

22 MR. DREEBEN: Essentially, Your Honor,
23 special counsel was appointed to conduct an
24 investigation --

25 THE COURT: I'm sorry. Answer my question.

1 Did you remember what my question was?

2 MR. DREEBEN: Yes, Your Honor, and I was
3 attempting to answer your question. We did acquire the
4 various investigatory threads that related to
5 Mr. Manafort upon the appointment of the special
6 counsel.

7 THE COURT: Apparently, if I look at the
8 indictment, none of that information has anything to do
9 with links or coordination between the Russian
10 government and individuals associated with the campaign
11 of Donald Trump. That seems to me to be obvious
12 because they all long predate any contact or any
13 affiliation of this defendant with the campaign. So I
14 don't see what relation this indictment has with
15 anything the special prosecutor is authorized to
16 investigate.

17 It looks to me instead that what is happening
18 is that this investigation was underway. It had
19 something. The special prosecutor took it, got
20 indictments, and then in a time-honored practice which
21 I'm fully familiar with -- it exists largely in the
22 drug area. If you get somebody in a conspiracy and get
23 something against them, you can then tighten the
24 screws, and they will begin to provide information in
25 what you're really interested in. That seems to me to

1 be what is happening here. I'm not saying it's
2 illegitimate, but I think we ought to be very clear
3 about these facts and what is happening.

4 Now, I think you've already conceded
5 appropriately that this investigation that has led to
6 this indictment long antedated the appointment of a
7 special prosecutor; that it doesn't have anything to do
8 with Russia or the campaign; and that he's indicted;
9 and it's useful, as in many cases by prosecutors, to
10 exert leverage on a defendant so that the defendant
11 will turn and provide information on what is really the
12 focus of the special prosecutor.

13 Where am I wrong in that regard?

14 MR. DREEBEN: The issue, I think, before you
15 is whether Mr. Manafort can dismiss the indictment
16 based on his claim.

17 THE COURT: Yes. Now I asked you: Where am
18 I wrong about that?

19 MR. DREEBEN: Your Honor, our investigatory
20 scope does cover the activities that led to the
21 indictment in this case.

22 THE COURT: It covers bank fraud in 2005 and
23 2007?

24 MR. DREEBEN: Yes, because --

25 THE COURT: Tell me how.

1 MR. DREEBEN: Your Honor, the authorization
2 for the special counsel to investigate matters is
3 described generally in the appointment order on May --

4 THE COURT: I have it right in front of me,
5 and it won't surprise you to learn that I'm fully
6 familiar with it. My question to you was, how does
7 bank fraud and these other things that go back to 2005,
8 2007, how does that have anything to do with links
9 and/or coordination between the Russian government and
10 individuals associated with the campaign of Trump?

11 MR. DREEBEN: So the authorization order
12 permits investigation of two different things that are
13 described in separate clauses. The first are links and
14 coordination between individuals associated with the
15 Trump campaign and the Russian government's effort to
16 influence the election. Mr. Manafort was a campaign
17 official.

18 THE COURT: You're running away from my
19 question again. You know, I'm focused on the
20 indictment that is here.

21 MR. DREEBEN: Correct.

22 THE COURT: It involves facts and
23 circumstances that go back as far as 2005 and come
24 forward, Mr. Manafort's loans from several banks that
25 you all claim he submitted fraudulent statements -- I'm

1 asking you, and I've already established this
2 investigation long predated the special prosecutor.
3 And so what is really going on, it seems to me, is that
4 this indictment is used as a means of exerting pressure
5 on the defendant to give you information that really is
6 in your appointment, but it itself has nothing whatever
7 to do with it.

8 MR. DREEBEN: Well, Your Honor, I understand
9 the question. I'm trying to explain why I think that
10 it does have to do with our investigatory scope, and I
11 think there are a couple of premises that may help
12 illuminate what that investigatory scope is.

13 The first one is that in examining an
14 individual who was associated with the Trump campaign
15 and did have Russian-affiliated connections, which
16 Mr. Manafort did --

17 THE COURT: Are they Russian or Ukrainian?

18 MR. DREEBEN: Both. Mr. Manafort worked
19 extensively in Ukraine, and he also has business
20 connections and other connections to individuals
21 associated with Russia.

22 In following the leads from those things,
23 investigators want to understand the full scope of his
24 relationship, how he was paid, with whom he associated,
25 what happened to the money, and that leads to the

1 activities that are at issue in this indictment.

2 THE COURT: Well, it didn't lead to that.
3 This was given to you by the Department of Justice.
4 The investigation was already well underway going back
5 to 2005. Am I correct?

6 MR. DREEBEN: Well, I think, Your Honor, the
7 investigation has developed considerably with the
8 special counsel.

9 THE COURT: Wasn't it already in existence in
10 the Department of Justice, and they gave it to you when
11 you all were appointed?

12 MR. DREEBEN: There were investigations that
13 were in existence, yes, but those investigations were
14 folded together with our overall examination of
15 Mr. Manafort's conduct that fits within (b)(i).

16 THE COURT: All right. Do you have it in
17 front of you?

18 MR. DREEBEN: Yes.

19 THE COURT: All right. I think you would
20 agree that the indictment that we have before the Court
21 is not triggered by (i), which says, "any links and/or
22 coordination between the Russian government and
23 individuals associated with the campaign of President
24 Donald Trump." Bank fraud in 2005 and other things had
25 nothing whatever to do with that.

1 So then you go to number two. It says, "any
2 matters that arose or may arise directly from the
3 investigation." Well, this indictment didn't arise
4 from your investigation; it arose from a preexisting
5 investigation even assuming that that (ii) is a valid
6 delegation because it's open-ended.

7 Go ahead, sir.

8 MR. DREEBEN: So I would take a different
9 look at the way this order works than Your Honor's
10 description for a couple of reasons.

11 THE COURT: All right.

12 MR. DREEBEN: The first is that in provision
13 (c) which is in the order, the special counsel is
14 authorized to prosecute matters that arose from the
15 investigation that is described earlier in the preamble
16 and in (b)(i) and (b)(ii). So we are not limited in
17 our prosecution authority to crimes that would fit
18 within the precise description that was issued in this
19 public order. If the investigation is valid, the
20 crimes that arose from that investigation are within
21 the special counsel's authority to prosecute.

22 THE COURT: Even though it didn't arise from
23 your investigation. It arose from a preexisting
24 investigation.

25 MR. DREEBEN: Well, the investigation was

1 inherited by the special counsel.

2 THE COURT: That's right, but your argument
3 says, Even though the investigation was really done by
4 the Justice Department, handed to you, and then you're
5 now using it, as I indicated before, as a means of
6 persuading Mr. Manafort to provide information.

7 It's vernacular by the way. I've been here a
8 long time. The vernacular is to sing. That's what
9 prosecutors use, but what you've got to be careful of
10 is they may not just sing. They may also compose. I
11 can see a few veteran defense counsel here, and they
12 have spent a good deal of time in this courtroom trying
13 to persuade a jury that there wasn't singing, there was
14 composing going on.

15 But in any event, finish up this point, and
16 then I'll come back to the defendant.

17 MR. DREEBEN: Well, Your Honor, we are the
18 Justice Department. We are not separate from the
19 Justice Department. The acting attorney general
20 appointed us to complete investigations and to conduct
21 the investigation that's described in this order.

22 In addition, the acting attorney general has
23 made clear in testimony before Congress that this order
24 does not reflect the details of the matters that were
25 assigned to us for investigation. And the word "arose"

1 from that's contained in (b) is not a full and complete
2 description that's meant to be judicially enforceable
3 of the matters that were entrusted --

4 THE COURT: So it's written by lawyers but
5 not intended to be judicially enforceable?

6 MR. DREEBEN: It's certainly not intended to
7 be judicially --

8 THE COURT: I think you are better off
9 arguing that it's very broad and that the matters that
10 are here are well within it. But to say that you can
11 write a letter delegating a job to somebody but don't
12 pay any attention to the scope of it is not very
13 persuasive to say the least.

14 MR. DREEBEN: Well --

15 THE COURT: What we don't want in this
16 country is we don't want anyone with unfettered power.
17 We don't want federal judges with unfettered power. We
18 don't want elected officials with unfettered power. We
19 don't want anybody, including the president of the
20 United States, nobody to have unfettered power. So
21 it's unlikely you're going to persuade me that the
22 special prosecutor has unlimited powers to do anything
23 he or she wants.

24 By the way, your office was appointed, you
25 say, in May 2017. Is there any requirement that you

1 make reports periodically to the attorney general?

2 MR. DREEBEN: Yes.

3 THE COURT: Does that include financial? I
4 think you were given \$10 million to begin with.

5 MR. DREEBEN: We have proposed a budget and
6 had a budget approved.

7 THE COURT: Of \$10 million?

8 MR. DREEBEN: I believe that's correct.

9 THE COURT: Have you spent that yet?

10 MR. DREEBEN: I am not in a position to talk
11 about what our budget is.

12 THE COURT: Are you in a position to tell me
13 when the investigation will be over?

14 MR. DREEBEN: I am not, Your Honor.

15 THE COURT: All right. Well, I understand
16 that, and it isn't pertinent to what I have to decide
17 today. And I understand your not being in a position
18 to tell me, but I'm sure you're sensitive to the fact
19 that the American people feel pretty strongly about no
20 one having unfettered power.

21 We had an interesting judicial conference in
22 the early '90s, I think, on the special prosecutor, and
23 they all appeared. I think it was at The Greenbrier.
24 I was the chair of that judicial conference. It was a
25 very interesting time. There were many special

1 prosecutors who appeared, including my former
2 constitutional law professor, Archie Cox, and others.
3 So I had a wonderful opportunity to meet and speak to
4 them and hear their variety of views.

5 All right. I think you answered my
6 questions, Mr. Dreeben. If you want to say anything
7 else -- now, of course, you're going to have a full
8 opportunity to respond to the defendant's arguments,
9 but I had some preliminary questions, which I think
10 you've answered.

11 MR. DREEBEN: I think I should clarify one
12 thing, Your Honor. We are not operating with
13 unfettered power. We're operating within a framework
14 of regulations that contemplate regular reporting to
15 the acting attorney general, who is supervising the
16 work of our office within the framework of --

17 THE COURT: Is that Rosenstein?

18 MR. DREEBEN: Yes.

19 THE COURT: Is he not recused?

20 MR. DREEBEN: No. He is the acting attorney
21 general who appointed the special counsel and who is
22 operating in the framework of internal Department of
23 Justice regulations. This is not the Independent
24 Counsel Act that Your Honor was referring to in the
25 conference that you spoke of. This is not a separate

1 court-appointed prosecutor who's operating under
2 statutory independence.

3 We are within the Department of Justice.
4 We're being supervised by an acting attorney general
5 who has conferred upon us specific jurisdiction and who
6 regularly is in a position to describe to us the metes
7 and bounds of that. There is in this record a
8 memorandum that he has issued on August 2 that explains
9 that crimes that arose from Mr. Manafort's receipt of
10 payments from Ukraine is within our jurisdiction and
11 was at --

12 THE COURT: Yes. I have that right here, and
13 I'm glad you raised it because 75 percent of it is
14 blocked out, redacted. Why don't I have a full copy of
15 it?

16 MR. DREEBEN: The only paragraphs that are
17 pertinent to Mr. Manafort are the ones that are
18 contained in this record.

19 THE COURT: Well, let me use a phrase that
20 I'm fond of that I used to use with my children. I
21 can't use it with my wife, but I'll be the judge of
22 whether it relates to the others. I think you should
23 give me under seal to be sure -- and you can do it
24 *ex parte* if you wish -- under seal, *ex parte* a complete
25 copy of the August 2, and I'll be the judge of whether

1 it has anything to do with Mr. Manafort.

2 MR. DREEBEN: Your Honor, if I could ask
3 leave to consult with the relevant components of the
4 intelligence community because that is a classified
5 document.

6 THE COURT: Yes, of course, you may do that.
7 If any part of it is classified, it won't surprise you
8 to know that a district judge is fully cleared. In
9 fact, I have several espionage trials underway. If
10 CIPA is needed, we will invoke it and use it. But I
11 don't think it will be necessary. I just want to be
12 sure I understand it fully.

13 What you're telling me is that the redacted
14 portions don't have anything to do with Manafort or the
15 issue he's raised. I don't have any reason to doubt,
16 especially because you're making in effect a
17 representation, but I'm not bound by that. I need to
18 satisfy myself. That's why I want to know.

19 I think it's perfectly appropriate for you to
20 consult with other parts of the government,
21 particularly intelligence agencies. If they feel some
22 of it is classified, I'm prepared to look at it
23 *ex parte* under seal. We've got a SCIF downstairs where
24 we put those things. So I'm fully familiar with that.
25 You may take some time to -- you can have two weeks to

1 explore that.

2 Now thank you. Do you have anything else at
3 this time?

4 MR. DREEBEN: I just wanted to connect the
5 dots with my reference to the August 2 scope
6 memorandum. Even if Your Honor is not satisfied that
7 on the face of the May 17 order the charges in this
8 indictment are within the scope of the special counsel,
9 the August 2 memorandum confirms the acting attorney
10 general's understanding both at the time of our
11 appointment and as of the time of that memo that these
12 crimes are within the scope of our authority. And the
13 explanation for the greater detail in the August 2 memo
14 is that the public order was not the place or occasion
15 to provide details about the matters that the special
16 counsel was to investigate.

17 So we are not operating off the range of what
18 the acting attorney general has authorized us to do. I
19 would respectfully submit that under Fourth Circuit
20 law, the regulation that Mr. Manafort is relying is not
21 a judicially enforceable matter. I understand Your
22 Honor's view on that. I think we have provided case
23 law on why we don't think it's a matter for judicial
24 enforcement. Even if the Court does, we do have
25 written confirmation that the matters in the indictment

1 are within our scope.

2 Thank you, Your Honor.

3 THE COURT: Thank you.

4 All right. I have actually heard probably
5 most of their argument, and I haven't heard all of
6 yours. You may now tell me what you think.

7 MR. DOWNING: Well, first of all, Your Honor,
8 good afternoon -- or good late morning.

9 I didn't know if you had any questions you
10 would like me to start off with answering as opposed to
11 just reiterating what's in the brief, but I will say --

12 THE COURT: Well, I don't want you to
13 reiterate what's in the brief. I've read that.

14 MR. DOWNING: Okay.

15 THE COURT: It's now your opportunity to
16 bring out what really you think is dispositive in some
17 arresting, interesting way.

18 MR. DOWNING: That's setting the bar high.

19 THE COURT: I reminisce a lot. The world has
20 changed. I was a student in England in the late '60s,
21 and I went to many oral arguments. They didn't use
22 briefs at all in the cases I went to. In the House of
23 Lords, the judges appeared in suits, and the lawyers
24 appeared and the barristers appeared in wigs and robes.
25 They together bent down, pulled books off the shelf,

1 and read cases together and argued about them. I
2 thought that was a charming but ineffective way to do
3 things. Writing briefs is much more effective, but
4 then it kind of renders oral argument a little more
5 uninteresting.

6 Tell me why -- you've heard him say -- I mean
7 their argument is fairly straightforward. They say you
8 look at the May 17 letter. It says any links and/or
9 coordination between the Russian government and
10 individuals associated with the campaign of President
11 Donald Trump; secondly, any matters that arose or may
12 arise directly from the investigation. Which I focused
13 on their investigation rather than the Department of
14 Justice's, but that's a fair point. And then the third
15 one is any other matters within the scope of 600.4 of
16 Title 28, Code of Federal Regulations.

17 Then counsel appropriately called my
18 attention to the August 2 memorandum from Rosenstein
19 which amplifies that a bit. Of course, most of the
20 letter is redacted, but I'm advised that that doesn't
21 have anything to do with Mr. Manafort. I'm going to
22 look at that myself.

23 But that goes on to say whether crimes were
24 committed by colluding with Russian government
25 officials with respect to the Russian government

1 efforts to interfere with the 2016 election for
2 president. That was pretty clear from the May letter.
3 But then they go on to say committed a crime or crimes
4 arising out of payments he received from the Ukrainian
5 government before or during the tenure of President
6 Viktor Yanukovich.

7 Well, we could argue all day here and not get
8 very much clarity on whether there's a difference
9 between the Ukraine and Russia. Of course, I wasn't
10 there any later than about 40 years ago, but if you ask
11 the average Ukrainian, they will tell you there's a
12 huge difference.

13 On the other hand, the government makes a
14 very powerful point. Yankovich's operation was
15 supported by the Russian government. He did
16 essentially what they wanted him to do, but he's not
17 there anymore. People are killing each other in the
18 eastern Ukraine. My hunch is that it's Ukrainians and
19 Russians that are mostly fighting.

20 MR. DOWNING: Actually, Your Honor, we've
21 spent a lot of time on this issue. For the work that
22 Mr. Manafort was involved with with Mr. Yankovich, they
23 were very --

24 THE COURT: They were very what?

25 MR. DOWNING: They were leaning towards

1 getting into the European union. They were actually
2 trying to get further away from Russia. Those were the
3 efforts of Mr. Manafort.

4 For today, I will say that the first comment
5 that you had has to do with the record. You asking for
6 an unredacted document so you can confirm what has been
7 represented to you by the government is, in fact, true
8 and correct, verify.

9 So the biggest problem we've seen in the
10 opposition to our motion is that this August 2 memo --
11 I'm not sure what we would refer to it as -- is the
12 only document that's been provided by the government to
13 verify that, in fact, they did not violate the special
14 counsel's statute or the regulation. It seems very
15 irregular for --

16 THE COURT: There isn't any guidance in the
17 statute; is it?

18 MR. DOWNING: No. The statute says
19 specifically directed.

20 Special counsel -- as you know, the regs came
21 about in a response to Congress, and a bipartisan
22 commission decided that having a continuation of the
23 independent counsel statute was a bad idea. They were
24 really bad results. So the regs as adopted basically
25 said to Congress, to the courts, and to the American

1 public: This won't happen again. We have a
2 politically accountable officer of the government, the
3 attorney general, and we have specific factual mandate
4 if a special counsel --

5 THE COURT: By politically accountable, what
6 do you mean?

7 MR. DOWNING: I mean someone who is senate
8 confirmed and appointed by the president of the United
9 States.

10 THE COURT: Serves at the pleasure of the
11 president?

12 MR. DOWNING: Correct, Your Honor.

13 THE COURT: So could be fired?

14 MR. DOWNING: Correct.

15 THE COURT: Go on.

16 MR. DOWNING: That politically accountable
17 officer now is the acting attorney general because of a
18 conflict or a recusal that occurred with the attorney
19 general. That conflict was necessary for the acting
20 attorney general to look to the special counsel statute
21 and say, Okay, I need to appoint a special counsel.

22 Now, what happens next, under the regs, it
23 says a specific factual description, which you have in
24 .1 we would agree. And then for any additional
25 jurisdiction, for any additional matters to be

1 investigated, the acting attorney general, the
2 politically accountable government official, has to
3 grant additional jurisdiction. It doesn't say, Sure,
4 go ahead and do something else. It says jurisdiction
5 because unless the acting attorney general conveys
6 jurisdiction on the special counsel, the special
7 counsel has no authority to act. The special counsel
8 is very limited. He has the authority of a U.S.
9 Attorney to the extent he's been given specific
10 jurisdiction and additional jurisdiction.

11 That second part of the appointment order
12 completely eviscerates the special counsel regulations
13 that require that the special counsel come back to the
14 acting attorney general, confer if he wants to expand
15 his investigation, and then there has to be a
16 determination made by the acting attorney general to
17 grant additional jurisdiction.

18 On the record we have in front of us right
19 here, that did not happen. What we've asked for is for
20 the government to produce the record. The
21 investigation that ends up here was an investigation
22 that was being conducted by the U.S. Attorney's Office
23 in the Eastern District of Virginia for quite some
24 time. We have no record of how that investigation got
25 transferred to the special counsel. We have no record

1 how an investigation involving banking issues made its
2 way to the special counsel. We only have --

3 THE COURT: Well, let me ask you: So what?
4 In other words, is what you're arguing that the use of
5 that investigation in this case is contrary to the
6 regulation that requires the acting attorney general
7 here, Rosenstein, to be specific about what areas he
8 wants investigated, and you're saying he was too
9 general. In this supplemental, doesn't he remedy that
10 in the August 2 letter?

11 MR. DOWNING: He can't retroactively remedy
12 it. The question is as of that date, what he did, does
13 it give jurisdiction to the special counsel, or is it
14 still so unrelated to the specific mandate as to be in
15 violation of the regulations and the underlying
16 statute? That's the question. You, I think, early on
17 got right to the point, which is this doesn't really
18 make any sense. This doesn't look like it's related.

19 Prior cases -- and there are cases that
20 involved the special counsel -- always look to is it
21 demonstrably related. The idea here is to keep a
22 narrow jurisdiction on the special counsel to not end
23 up with another independent counsel. When you see
24 (b)(ii), it looks like another independent counsel. It
25 didn't even require for Mr. Mueller to go back to

1 Mr. Rosenstein if he wanted to expand under (b)(ii).
2 It just says anything that arises or may arise.
3 That --

4 THE COURT: Let's assume for a moment your
5 argument that this delegation is in some way illegal.
6 Why isn't the right result simply to give to the
7 Eastern District of Virginia's U.S. Attorney's
8 Office -- give it back to them and let them prosecute
9 this indictment? Why isn't that the right result?

10 MR. DOWNING: Well, the right result may be
11 for the Department of Justice to finish the
12 investigation they had started and make a determination
13 as to whether or not to charge Mr. Manafort. But if,
14 in fact, this order is defective, then Mr. Mueller did
15 not have the authority of the U.S. Attorney to conduct
16 a grand jury investigation, to get search warrants, or
17 to return and sign an indictment.

18 THE COURT: All right. I think I understand.
19 Is there anything else you want me to --

20 MR. DOWNING: We make, I think, one point for
21 the Court, and I think it's an important point. The
22 government had argued initially that these matters
23 arose during their investigation. I think the
24 government is now admitting, no, they didn't. That's a
25 big admission, and it wasn't in their papers. All the

1 way up to being in court here today, I have not heard
2 the government admit to the Court that that's exactly
3 what happened. It looked like --

4 THE COURT: What's exactly what happened?

5 MR. DOWNING: That they grabbed these
6 investigations from other components of the Department
7 of Justice in the U.S. --

8 THE COURT: You say these investigations.
9 Are you saying this indictment against Mr. Manafort?

10 MR. DOWNING: Yes, Your Honor.

11 THE COURT: All right. Go on.

12 MR. DOWNING: So in their papers, they've
13 been arguing, oh, they came upon this during their
14 investigation. That's not the facts. So I'd like to
15 make that record clear, that their arguments in their
16 brief are absolutely erroneous. It didn't arise during
17 it, and I think that matters because their other
18 argument was, well, this whole thing falls into the
19 first specific description, which I think you've
20 pointed out: In no way does it make any sense that it
21 falls into the first description.

22 Then finally, when you go and look at
23 Mr. Rosenstein's memo, it's very odd for when it
24 occurs, but the most obvious omission from it is it
25 does not say "as we agreed" or "as we discussed." It

1 just puts something in a point in time with no relation
2 back to what happened on or before May 17.

3 And just one other issue. The government
4 continues to refer to these regulations as no different
5 than something that would be in the U.S. Attorney's
6 manual or a written policy. Obviously, the Department
7 of Justice for some time and the attorney general
8 decided to make these special counsel regulations.
9 They didn't make it a policy. They didn't make it a
10 procedure. They didn't put it in the U.S. Attorney's
11 manual. They made it a regulation, and they did it
12 publicly to say to the country, to Congress, and to the
13 courts and the land that this is how we're going to
14 conduct ourselves.

15 The attorney general certainly at points in
16 time could have taken that right back, but he never
17 did. He left it on the books. They promulgate that
18 these regs are controlling the office of this special
19 counsel in a public notice, their appointment order.
20 So they tell the world: Don't worry about it. We're
21 not going to end up with this runaway special counsel
22 like we've seen with the independent counsel. When
23 they come to court, they say, By the way, these are not
24 judicially enforceable. It's as if they hoodwinked the
25 entire United States into thinking that this was going

1 to be different than the independent counsel.

2 I think it's very important for the
3 government to be held accountable just like the
4 government was and the Department of Justice was in
5 *U.S. v. Nixon*. You put these regulations out there.
6 You're telling the world. You're telling the
7 government. You're telling the United States citizens:
8 You can rely upon us conducting ourselves in this
9 manner. Then when they don't and they don't produce a
10 record, they say to this Court, they say to Manafort,
11 they say to the country: Guess what? It's not
12 enforceable. And I don't think that can stand, Your
13 Honor.

14 THE COURT: All right. Let me hear your
15 response. You've already made most of it, but repeat
16 what you feel is necessary.

17 MR. DREEBEN: Thank you, Your Honor.

18 Let me try to make four quick points and
19 answer any questions that the Court may have.

20 First, Mr. Manafort's counsel treats the
21 May 17 order as if it is the specific factual statement
22 that's contemplated by the special counsel regulations.
23 It is not. The regulations nowhere say that a specific
24 factual statement needs to be provided publicly, and in
25 the context of a confidential, sensitive

1 counterintelligence investigation that involves
2 classified information, it would not make any sense for
3 that information to be conveyed publicly. Mr. Manafort
4 actually acknowledged that in argument on this issue
5 before the district court in the District of Columbia.
6 The specific factual statement, as Attorney General
7 Rosenstein described in his Congressional testimony,
8 was conveyed to the special counsel upon his
9 appointment in ongoing discussions that defined the
10 parameters of the investigation that he wanted the
11 special counsel to conduct. So it is not really
12 appropriate to assume that the (b)(i) description is
13 the factual statement that the regulations contemplate.

14 THE COURT: Well, I understand your argument,
15 but let me characterize it and see if you find it as
16 satisfying as you appear to indicate that you think it
17 is: We said this is what the investigation was about.
18 But we're not going to be bound by it, and we weren't
19 really telling the truth in that May 17 letter.

20 I don't watch pro football, but I used to
21 enjoy the program that came beforehand where a bunch of
22 players would get on and essentially make fun of
23 everybody. But they would put on some ridiculous
24 thing, and then they would all say in a chorus, Come
25 on, man.

1 I loved that. I thought that was great.

2 So your argument that we said this was the
3 scope of the investigation but we really didn't mean it
4 because we weren't required by any law or regulation to
5 say what the scope was, I understand that argument, but
6 it kind of invites, Come on, man. You said that was
7 it.

8 But I think your argument goes on, and you
9 say, Look, the May 17 letter isn't the end of it.
10 There is the August 2 letter, and in the August 2
11 letter, it's expanded considerably because it then
12 says -- Russian government is number one, and then it
13 goes on to the Ukrainian government which is never
14 mentioned beforehand. Who knows what else, of course,
15 went on?

16 In any event, I wanted you to be clear how I
17 understand that particular argument.

18 MR. DREEBEN: Can I take a shot at explaining
19 why I don't think that's the accurate way to look at
20 it?

21 THE COURT: Of course you may.

22 MR. DREEBEN: So we're dealing here with a
23 national security counterintelligence investigation
24 that had been conducted by the FBI that had numerous
25 different aspects to it that were --

1 THE COURT: Are you telling me that in this
2 indictment that's before the Court on Mr. Manafort,
3 that I'm going to have to go through CIPA, that there's
4 going to be a Section 4 filing, that there will be
5 classified documents, they'll have an opportunity to
6 say what they need to say, etc., etc.?

7 MR. DREEBEN: I hope not, Your Honor. I was
8 trying to describe the overall --

9 THE COURT: Well, you're making a big deal
10 out of it being a classified kind of thing. If that's
11 in any way relevant to his defense, there we go with
12 another CIPA. I have been through CIPA cases going way
13 back to John Walker Lindh and other matters. If that's
14 what's going to happen, I'd like to have notice of it.
15 You all could drag this out. I'm an old man. You
16 could actually outlive me.

17 MR. DREEBEN: I'm not trying to do that, Your
18 Honor.

19 THE COURT: This proceeding could outlive me.
20 In fact, if a lot of lawyers around here had their way
21 about it, they would take steps to ensure that almost
22 everything outlived me.

23 MR. DREEBEN: Let me try to be brief.

24 THE COURT: All right, sir. That's welcome.

25 MR. DREEBEN: The May 17 order could not

1 fully describe the matters that the acting attorney
2 general wanted the special counsel to investigate
3 because they implicated people who were under
4 investigation but who may never be charged and
5 sensitive national security matters. As a result, the
6 specifics of the investigation were conveyed to us not
7 on the face of the May 17 order but in interaction with
8 the acting attorney general. He explained this in his
9 testimony in just these terms, simply could not be made
10 public.

11 I think Your Honor would agree that it's not
12 appropriate for the government to disclose specific
13 subjects of an investigation when those matters may
14 never result in a charge and when they could jeopardize
15 ongoing criminal investigations, as well as reveal
16 national security matters. That was the only point
17 that I was trying to make one. (b)(i) is not the
18 factual statement.

19 THE COURT: All right.

20 MR. DREEBEN: The second point here is that
21 we are within the Department of Justice. To the extent
22 that Mr. Manafort is suggesting that we're analogous to
23 the independent counsels that operated under the old
24 statute, that's not right. Our indictment was reviewed
25 and approved by the Tax Division, by the National

1 Security Division. We operate within a framework of
2 the Department of Justice. We're not different from
3 the U.S. Attorney's Office in that respect. We're all
4 part of the same Department of Justice.

5 THE COURT: You resisted my suggestion to
6 have someone here, and Mr. Asonye showed up. When did
7 you ask Mr. Asonye to join you?

8 By the way, don't nod or shake your head out
9 here because it interrupts the speaker. It's rude, and
10 it has often the opposite effect you may -- I was never
11 able to do that by the way. When I was sitting where
12 you are, I nodded and shook my head all the time.
13 Despite the fact that it aggravated judges, I did it,
14 and I regret that. My perspective is a little
15 different now. I expect you to do what I was unable to
16 do. Don't worry about it. It's not a big deal.

17 Go ahead.

18 MR. DREEBEN: Thank you, Your Honor.

19 We took your admonition to heart, and we are
20 very happy to have Mr. Asonye join us.

21 THE COURT: Good. I think that's important
22 for communications as well. Plus, you never know. If
23 you have to try this case, you will have to try it
24 before me. Mr. Asonye has some experience here.

25 Is that right, Mr. Asonye?

1 MR. ASONYE: Yes, Your Honor.

2 THE COURT: And before me as well.

3 MR. ASONYE: Yes, Your Honor.

4 THE COURT: So he can tell you some
5 interesting things.

6 MR. DREEBEN: Two more quick points with
7 leave, Your Honor.

8 THE COURT: Yes.

9 MR. DREEBEN: First, Your Honor referred to
10 the fact that there were ongoing investigatory matters
11 that concerned Mr. Manafort before the appointment of
12 the special counsel, but the investigation that the
13 special counsel has conducted has considerably advanced
14 and deepened our understanding of the matters that have
15 been previously identified. So it is not entirely fair
16 to say that the matters in the indictment did not arise
17 from the investigation or could not have arisen from it
18 because our investigation --

19 THE COURT: It factually did not arise from
20 the investigation. Now, saying it could have arisen
21 under it is another matter, but factually, it's very
22 clear. This was an ongoing investigation. You all got
23 it from the Department of Justice. You're pursuing it.
24 Now I had speculated about why you're really interested
25 in it in this case. You don't really care about

1 Mr. Manafort's bank fraud. Well, the government does.
2 You really care about what information Mr. Manafort can
3 give you that would reflect on Mr. Trump or lead to his
4 prosecution or impeachment or whatever. That's what
5 you're really interested in.

6 You know, when a prosecutor is appointed,
7 he's appointed to get an indictment. He's appointed to
8 go after somebody. Somebody mentioned to me not long
9 ago that this is a different scheme, that it's not the
10 scheme that was in effect in the '60s and '70s. That's
11 true, but I suspect the change in this process is not
12 significant. It's still the same. It's still the
13 same. You appoint a prosecutor, and that prosecutor
14 goes after with the intent -- whether it was Clinton or
15 whoever else it was, Reagan or whoever, they go after
16 him with the idea they've got to get an indictment. If
17 they don't, they're very unhappy. I remember speaking
18 to one special prosecutor, the Iran-Contra thing, and
19 he was terribly disappointed. That's what prosecutors
20 do. I understand that.

21 The Brits use a different system. They don't
22 use special prosecutors. They use a commission to go
23 out and investigate it and write a report, and then
24 people sort of accept that. In this country, I don't
25 think a commission could do the job you all are doing.

1 It doesn't have the power to subpoena. It doesn't have
2 the power to impanel a grand jury, etc., etc. I
3 understand that, but it sure is less disruptive.

4 In any event, your point, if I can distill it
5 to its essence, is that this indictment can be traced
6 to the authority the special prosecutor was given in
7 the May and August letters. That, as far as you're
8 concerned, is the beginning and end of the matter.

9 MR. DREEBEN: Yes, Your Honor, it is the
10 beginning and almost the end.

11 And this is my last point, I promise.

12 THE COURT: All right.

13 MR. DREEBEN: The special counsel regulations
14 that my friend is relying on are internal DOJ
15 regulations. He referred to them as if they're a
16 statute. I want to be clear. They are not enacted by
17 Congress. They are internal regulations of the
18 Department of Justice.

19 THE COURT: Most regulations aren't enacted
20 by Congress. They're promulgated by agencies pursuant
21 to rule-making authority.

22 MR. DREEBEN: Correct.

23 THE COURT: Congress doesn't do it.

24 MR. DREEBEN: Correct. But he referred to
25 them as a statute. I just wanted to be clear we're --

1 THE COURT: Yes, I'm clear about that. I've
2 learned a few things.

3 MR. DREEBEN: The fourth, they conclude in a
4 provision that's applicable here, 600.10, by describing
5 that these rules and regulations are not intended to
6 create any rights that can be enforced by individuals
7 in any proceedings, civil or criminal.

8 THE COURT: Yes, I have that in front of me.

9 MR. DREEBEN: The reason for that is that
10 this is a way for the Department of Justice to organize
11 its investigatory and prosecutorial actions. It's no
12 different than the acting attorney general assigned a
13 matter to the Eastern District of Virginia or assigned
14 it to a component of the Department of Justice. It's
15 not there for the benefit of individual --

16 THE COURT: Of course, the difference is that
17 if you did assign it to the Eastern District of
18 Virginia, it wouldn't come, Mr. Asonye, with a
19 \$10 million budget; would it?

20 MR. DREEBEN: Your Honor --

21 THE COURT: Look, I take your point on
22 600.10, that it doesn't create any rights, but that's a
23 little bit like arguing, look, we issued these internal
24 things but don't expect us to be bound by them. I
25 think your stronger argument is you complied with them.

1 MR. DREEBEN: I agree that is a strong
2 argument.

3 THE COURT: It's not a very strong argument
4 to say, Don't hold us to it because we didn't mean it.
5 We said it, but we didn't mean it.

6 MR. DREEBEN: Can I refer the Court to a
7 Fourth Circuit case that interpreted very similar
8 language and concluded that it was not enforceable in a
9 court?

10 THE COURT: Yes, of course.

11 MR. DREEBEN: We cited this case in our
12 brief. It is *In re Shain*. It's 978 F.2d 850. It's a
13 1992 decision of the Fourth Circuit, and it concerned
14 the media subpoena regulation that the department has,
15 which it has established in order to put a buffer zone
16 around subpoenas that may go to the media. It's not
17 required by the First Amendment but reflects the
18 Department of Justice's internal sensitivity to seeking
19 information from the media. The litigant in that case
20 claimed that the department had violated that
21 regulation, issued a subpoena that wasn't authorized by
22 it, and the Fourth Circuit concluded that this was an
23 internal DOJ regulation. It contained language very
24 similar to 600.10, and the Fourth Circuit held, This is
25 not a matter for courts to enforce. It's an internal

1 DOJ matter. Respectfully, Your Honor, although we
2 fully agree that we are authorized to conduct this
3 investigation and there's no basis for dismissing the
4 indictment, I would also refer you to this case.

5 THE COURT: Wasn't there a matter in New York
6 recently that the special counsel returned to the
7 Southern District of New York?

8 MR. DREEBEN: The special counsel's office
9 did refer certainly allegations concerning an
10 individual to the Southern District.

11 THE COURT: Why did it do it?

12 MR. DREEBEN: With respect, Your Honor, I'm
13 not at liberty to go into the internal prosecutorial
14 matters within the Department of Justice.

15 THE COURT: Let me ask you this: Did it do
16 it because it concluded that it had uncovered materials
17 that really weren't within the scope of what it was
18 authorized to look into, or did it do it because, well,
19 we're not interested in it because we can't use this to
20 further our core effort, which is to get --

21 MR. DREEBEN: Let me try to answer Your
22 Honor's question this way --

23 THE COURT: -- to Trump?

24 MR. DREEBEN: -- because I want to be
25 responsive and at the same time respect internal

1 investigatory equities.

2 THE COURT: I'm not asking you to disclose
3 anything that you can't disclose.

4 MR. DREEBEN: We take very seriously the
5 primary mission that was assigned to us by the acting
6 attorney general in the May 17 order, which is to
7 investigate, not prosecute necessarily unless there's a
8 prosecutable crime, but to investigate Russia's
9 interference with the 2016 presidential election and
10 links or coordination that may have occurred with
11 individuals associated with the campaign of President
12 Trump.

13 We are focused on that mission. We may
14 uncover other criminal activity in the course of that
15 that is necessary for us to investigate in order to
16 complete that mission. We may uncover criminal
17 activity that is not necessary for us to investigate
18 but is still appropriately investigated by a different
19 component of the department. We have sought to respect
20 that line. We have consulted with the acting attorney
21 general in order to make sure that we are operating
22 within --

23 THE COURT: All right. That's helpful. But
24 it brings me back to a point that I don't know that we
25 adequately plumbed, and that is why in New York did you

1 feel that it wasn't necessary for you to keep that but
2 it is necessary for you to keep this which involves
3 bank fraud and registration and other things dating
4 back to 2005, 2007, which I think manifestly don't have
5 anything to do with the campaign or with Russian
6 collusion? You're keeping one and giving up the other.
7 I don't see the difference.

8 I think one answer you could tell me, and I
9 want to say it because I think you would properly be a
10 little reluctant to do it. It is this: It's none of
11 your business, Judge, why we did that. We're going to
12 proceed on that.

13 Well, I think that's a fair point to make.
14 I'm not sure it's none of my business because I don't
15 have yet a full understanding of everything, but why is
16 New York different? And if you can't tell me, I accept
17 that.

18 MR. DREEBEN: Well, Your Honor, I think I can
19 be helpful to you about this case. In this case,
20 Mr. Manafort clearly is within the area of
21 investigation because of his affiliation with the
22 campaign of President Trump and because of his
23 affiliations in Ukraine with Russia-associated
24 individuals. Once a prosecutor --

25 THE COURT: Suppose you found a crime that he

1 committed -- let's say the statute of limitations was
2 20 years ago. Would that permit you to go after him
3 and use it to coerce him or put pressure on him to turn
4 on others or Trump himself?

5 MR. DREEBEN: If it's not factually linked to
6 the subject of the investigation, then we would go back
7 under the regulations if we thought it was appropriate
8 for us to investigate and have the acting attorney
9 general decide that, but here the crimes --

10 THE COURT: Can you tell me how these things
11 in the indictment are factually linked to Russian
12 influence over the 2016 election?

13 MR. DREEBEN: They're factually linked to the
14 areas of our investigation because in trying to
15 understand the activities of Mr. Manafort in Ukraine
16 and associations that he may have had with Russian
17 individuals and the depth of those, we needed to
18 understand and explore financial relationships and to
19 follow the money where it led. So the logic of the
20 investigation has factual connections to the
21 indictment. I think in Your Honor's hypothetical, that
22 would not have been so, and that's the fundamental
23 difference.

24 THE COURT: All right. I might mention to
25 you that I've gone through the indictment, as you would

1 expect me to do. There's no mention in the indictment
2 that I know of that refers to any Russian individual or
3 any Russian bank or any Russian money or any payments
4 by Russians to Mr. Manafort. Correct?

5 MR. DREEBEN: I think that is correct, but
6 the money that forms the basis for the criminal charges
7 here, the tax charges, the bank fraud charges comes
8 from his Ukraine activities. That's what we were
9 focused on. So we followed the money into the
10 transactions that led to the criminal charges here, and
11 it's that factual link that connects the subject of the
12 investigation in --

13 THE COURT: You can't be talking about bank
14 fraud because that's not where money came from. That's
15 getting money from a bank without telling the truth,
16 but it could be in the false income tax. Is that what
17 you're suggesting?

18 MR. DREEBEN: It's both, Your Honor, because
19 the Ukraine money was used to purchase and improve real
20 estate. The transactions that are charged as bank
21 fraud extracted that money and made it --

22 THE COURT: Purchases of his homes.

23 MR. DREEBEN: With money that he derived from
24 the Ukraine activities we've alleged. That's the
25 factual connection, Your Honor. I'm just trying to

1 explain why we regard this as connected to our
2 investigation.

3 THE COURT: All right. Thank you.

4 MR. DREEBEN: Thank you.

5 THE COURT: Do you have anything else to add?

6 MR. DOWNING: Just briefly, Your Honor. The
7 one thing we would ask this Court to do before deciding
8 the motion before the Court is to ask the government
9 for what anybody who has had any experience with the
10 Department of Justice knows exists, which is the
11 written record. Where is the written record before
12 Mr. Mueller was appointed? Where is the written record
13 about the decision --

14 THE COURT: What do you mean by the written
15 record?

16 MR. DOWNING: Mr. Rosenstein had a process he
17 had to go through in order to determine that there was
18 a conflict that gave rise to the appointment of special
19 counsel, the specific matter that the special counsel
20 was going to investigate in any additional jurisdiction
21 he granted. It would all be written down somewhere.
22 That's how the Department of Justice works.

23 Mr. Rosenstein even conceded when he was
24 testifying up on the Hill and he was confronted with
25 the question of, When did you expand the jurisdiction

1 to the special counsel? He couldn't or wouldn't answer
2 the question, but he did say very tellingly, I will go
3 back and check my records, and I will get back to you.

4 So we would ask that this Court order the
5 government to turn over those records so that the Court
6 doesn't have to guess what happened.

7 THE COURT: What records is what I'm asking
8 you.

9 MR. DOWNING: Well, Mr. Rosenstein referred
10 to records.

11 THE COURT: In his testimony?

12 MR. DOWNING: Correct.

13 THE COURT: What records are you referring
14 to? That is, what kinds of records?

15 MR. DOWNING: Well, Your Honor, generally --

16 THE COURT: Are you suggesting that
17 Rosenstein had to go through some process to conclude
18 that there was some conflict before the Department of
19 Justice could proceed?

20 MR. DOWNING: Which he also testified to.

21 THE COURT: All right. Is that what
22 you're -- the record of identifying the conflict?

23 MR. DOWNING: I believe identification of the
24 conflict, the matter that needed to be referred to a
25 special counsel in order to -- because of the conflict

1 and the scope of the special counsel's investigation,
2 including any additional jurisdiction.

3 THE COURT: The May and August letters are
4 the scope.

5 MR. DOWNING: That's after the fact. You
6 would expect that the Department of Justice, especially
7 Mr. Rosenstein, would have had a memo before.

8 THE COURT: Why do you say that?

9 MR. DOWNING: Because in the Department of
10 Justice generally, just in any situation --

11 THE COURT: Did you serve in the department?

12 MR. DOWNING: Fifteen years, five of which
13 was under Mr. Rosenstein's management. Mr. Rosenstein
14 is a stickler for memos being written, for there to be
15 a written record for the actions of the Department of
16 Justice.

17 THE COURT: What good would that do me if I
18 had all of that in front of me?

19 MR. DOWNING: It might show you exactly
20 whether or not Mr. Rosenstein violated the regs or
21 whether he complied with them.

22 THE COURT: I don't know about regulations,
23 but let's suppose he violated. Of course, counsel has
24 already pointed out that that's, in his view,
25 irrelevant. But let's suppose it shows that, that

1 Rosenstein didn't do a good job. So what?

2 MR. DOWNING: So our position is that to the
3 extent that Mr. Rosenstein exceeded his authority to
4 appoint a special counsel, the special counsel does not
5 have the authority of a U.S. Attorney.

6 THE COURT: Thank you.

7 MR. DOWNING: Thank you.

8 THE COURT: All right. I'll take the matter
9 under advisement.

10 Did you wish to respond to this last point?

11 MR. DREEBEN: No thank you, Your Honor,
12 unless you have any questions.

13 THE COURT: Good choice on your part.

14 I must tell you that I'm exercising
15 uncharacteristic restraint on my part not to require
16 you to tell me about those things, but I think I have
17 an adequate record now. You're going to let me know in
18 two weeks the rest of this letter.

19 I'm going to be interested if CIPA really is
20 invoked. That creates a whole new regime for the
21 treatment of discovery and so forth, as you all well
22 know.

23 Thank you for your arguments. They were
24 entertaining. I think I found the right adjective.
25 Thank you.

1 Mr. Asonye, I'm glad to see you here.

2 MR. ASONYE: I'm glad to see you as well,

3 Your Honor.

4 -----
Time: 10:57 a.m.

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22 I certify that the foregoing is a true and
23 accurate transcription of my stenographic notes.

24

25 /s/
Rhonda F. Montgomery, CCR, RPR